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No. 82-825

In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

DIANNA B. JOHNSTON
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20507

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Respondent argues that a commissioner's charge must detail its factual basis because in 1964 Congress intended "to restrict the investigative powers of the Commission" (Resp. Br. 9) and in the 1972 amendments to Title VII made the requirements for a commissioner's charge even "more stringent" (*id.* at 14). This submission, however, is at odds with the plain language of Section 706(b), 42 U.S.C. 2000e-5(b), its legislative history, and—except for the decision of the court below—all case law interpreting the section. See Pet. 9-10; Pet. Br. 18-19, 23-26. Indeed, since our opening brief, yet another court of appeals has rejected the position of the respondent and the court below. *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d 780 (7th Cir. 1983), petition for cert. pending, No. 83-401. It is, in sum, quite clear that Section 706(b) does not require a detailed "factual basis" (Pet. App.

7a, 8a) for the allegations contained in a commissioner's charge. See, *e.g.*, *EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1338 (9th Cir. 1980); *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055, 1063 n.7 (6th Cir. 1982).

I

A. Employers have repeatedly made the argument, advanced once again by the respondent (Resp. Br. 10-14), that Congress in 1964 intended to deny the Commission broad investigatory powers.[1] That contention, however, has been soundly rejected.[2] Indeed, the 1964 legislative history demonstrates that, contrary to respondent's suggestion (Resp. Br. 5, 12-13), Congress did not limit the Commission's authority to investigation of specific charges of discrimination filed by individual complainants. Rather, the debate on Title VII demonstrates that one reason Congress empowered the Commission to file commissioners' charges was to authorize investigation into instances of systemic discrimination.[3] Thus, contrary to

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[1] As we have previously noted (Pet. Br. 21 n.13; Pet. Reply Br. 9), the issue whether the Commission possesses the authority to investigate respondent's employment practices is not properly before the Court.

[2] See, *e.g.*, *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 358 (6th Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 425 (8th Cir. 1970); *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d 32, 39 (4th Cir. 1971); *Local 104, Sheetmetal Workers* v. *EEOC*, 439 F.2d 237, 242 (9th Cir. 1971); *Motorola* v. *McLain*, 484 F.2d 1339, 1345 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

[3] In response to an attempt by Senator Ervin to delete the commissioner's charge provision of Title VII, Senator Pastore argued that:

> The elementary question is whether we want to leave the institution of a charge strictly and solely to the individual, or whether we want to give the power to the Commission, or to the members of the Commission, to initiate a complaint where there is possibly a pattern of discrimination in employment practices.
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> * * * * *
>
> [I]f we mean to do anything at all about this problem in the public interest, we must give the authority to a member of the

respondent's contention (Resp. Br. 12-13), Congress did not grant the EEOC the authority to file commissioners' charges for the "sole reason" of protecting claimants who might be fearful of reprisal. Even in 1964, Congress recognized that a commissioner's charge could be utilized to alleviate instances of systemic discrimination that may not be readily identifiable on the basis of individual complaints alone. See *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d at 38.[4]

In any event, the 1972 amendments to Title VII make it abundantly clear that the Commission has broad discretion to initiate investigations into suspected instances of systemic discrimination. By the early 1970's, Congress had become aware that employment discrimination was a "complex and pervasive phenomenon," attributable to "systems" and "effects" rather than simply to individual and intentional ill-will. H.R. Rep. 92-238, 92d Cong., 1st Sess. 8 (1971); S. Rep. 92-415, 92d Cong., 1st Sess. 5 (1971). Congress further believed that "[u]nrelenting broad-scale action against patterns and practices of discrimination is * * * critical in combatting employment

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Commission to initiate a charge where he feels that there is a pattern of discrimination. The Commission can then investigate it.

110 Cong. Rec. 14189 (1964), *reprinted in Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, at 3306 (1968).

[4] Respondent's assertion that "[t]he courts in cases involving a Commissioner's charge, until this one, apparently assumed that the Commissioner's charge at issue was based on an underlying individual charge * * * filed by a person who wished to remain anonymous" (Resp. Br. 13, n.14) is baseless. Most cases in fact give no indication that the court made any such assumption (see, *e.g.*, *Sparton Southwest, Inc.* v. *EEOC*, 461 F.2d 1055 (10th Cir. 1971) (en banc); *General Employment Enterprises, Inc.* v. *EEOC*, 440 F.2d 788 (7th Cir. 1971); *Mountain States Telephone & Telegraph Co.* v. *EEOC*, 466 F.2d 541 (10th Cir. 1972)), and at least one court has expressly held that a commissioner's charge is not defective because it does not rest upon "a particular instance of discrimination." *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 240.

discrimination," and it recognized that "[t]he Commission is best able to determine where 'pattern or practice' litigation is warranted" because "[i]t has access to the most current statistical computations and analyses regarding employment patterns." H.R. Rep. 92-238, *supra*, at 14. Accordingly, Congress empowered the Commission "to deal comprehensively with systemic discrimination." *Ibid.* The EEOC was granted the authority to initiate and investigative charges of a pattern or practice of discrimination based on its statistical records, and it was permitted—for the first time—to pursue those charges in court. 42 U.S.C. 2000e6(c)-(e).[5] This broad expansion of the Commission's authority contradicts respondent's assertion (Resp. Br. 35-36) that Congress intended to circumscribe narrowly the authority of a Commissioner to file a charge based upon a suspected pattern or practice of discrimination. See generally *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 358-373 (1977).[6]

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[5] Prior to the 1972 amendments, the Commission was not authorized to bring employment discrimination litigation.

[6] As noted by respondent (Resp. Br. 16), the Senate version of the 1972 amendments provided that charges were to be filed "upon the request of any person claiming to be aggrieved." 118 Cong. Rec. 4944 (1972). The Senate Committee on Labor and Public Welfare, however, made it clear that this provision was not intended to limit commissioners' charges to individual claims of discrimination (S. Rep. 92-415, 92d Cong., 1st Sess. 27 (1971)), and, in any event, the Senate receded to the House bill, which deleted the "upon request of any person * * * aggrieved" language of the bill. Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1814, 1836 (Comm. Print 1972) (hereinafter cited as 1972 Leg. Hist.).

The respondent's related assertion that Congress restricted the Commission's authority in 1972 "despite the Commission's preference for independent pattern or practice authority" (Resp. Br. 35) rests upon a misinterpretation of the legislative history of the 1972 amendments. The testimony of Chairman William H. Brown that is relied upon by respondents (Resp. Br. 35) came at a time when Congress was considering conferring cease and desist authority

B. Respondent's submission that the Commission's "charge-based investigatory authority" is inherently limited (Resp. Br. 7) is no more persuasive than the argument it attempts to wrench from the legislative history of Title VII. Although Commission investigations are "charge-based," the EEOC has the unchallenged authority to initiate its own charges (42 U.S.C. 2000e-5(b)) and that power extends to claims which allege a pattern or practice of discrimination (42 U.S.C. 2000e-6(e)). And, contrary to respondent's submission, this "self-initiating authority" (Resp. Br. 7) unquestionably bestows substantial investigatory powers upon the Commission. Indeed, the Commission possesses "the same investigatory authority as is contained in the National Labor Relations Act" (S. Rep. 92-681, 92d Cong., 2d Sess. 19 (1972)), and this Court has recognized that the National Labor Relations Board has "broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 308 (1959). See 42 U.S.C. 2000e-8(a), 2000e-9.[7]

Thus, respondent's argument that the Commission's investigatory authority is "limited" because it depends upon the issuance of a "valid" charge (Resp. Br. 35) overlooks the fact that the Commission plainly has the authority

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upon the Commission. The Chairman's testimony was to the effect that cease and desist procedures were not the best means of processing pattern or practice actions. He testified that, should the Commission be given authority to bring pattern or practice claims before a federal court, the Commission should be authorized to bring suit directly rather than rely on enforcement of a cease and desist order. 118 Cong. Rec. 1393 (1972); 1972 Leg. Hist. 932. The fact that this recommendation was ultimately adopted does not demonstrate that Congress intended to "restrict" the investigative powers of the Commission.

[7] Since 1972, the courts of appeals have consistently equated the EEOC's investigatory authority with that of the NLRB. *In re EEOC*, 709 F.2d 392, 396 (5th Cir. 1983); *Food Town Stores, Inc.* v. *EEOC*, 708 F.2d 920, 924 (4th Cir. 1983); *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338.

to issue a charge based upon an alleged pattern or practice of discrimination and it thereafter has significant power to investigate that charge. Like their counterpart charges under the National Labor Relations Act, commissioner's charges are not to be subjected to intense judicial review simply because they are a prelude to investigative scrutiny. Indeed, such charges should not even "be measured by the standards applicable to a pleading in a private lawsuit" because their "purpose is merely to set in motion the machinery of an inquiry." *NLRB* v. *Fant Milling Co.*, 360 U.S. at 307.

II

In view of the uniform precedent upholding generally worded charges under the original Act (see Pet. Br. 18-19 & n.12), respondent virtually concedes that, under Title VII as enacted in 1964, the charge in this case would be valid (Resp. Br. 32-33). Respondent argues, however, that the 1972 legislative history "suggests an intent to make the requirements for a Commissioner's charge more stringent than the previous 'reason to believe' standard" (*id.* at 15). This argument misinterprets both the prior "reasonable cause" standard for commissioners' charges and amended Section 706(b)'s oath and notice requirements.

A. Section 706(b), as originally enacted, imposed specific restrictions on the filing of a commissioner's charge. Unlike a charge filed by an aggrieved individual, a commissioner's charge could be filed only where the Commissioner had "reasonable cause to believe a violation of [Title VII] ha[d] occurred," and the charge "set[] forth the facts upon which it [was] based" (Pub. L. No. 88-352, 78 Stat. 259). In 1972, however, Congress deleted the "reasonable cause" and factual basis requirements and made commissioners' charges subject to precisely the same standards as those applicable to the complaints of aggrieved individuals—*i.e.*, the charges must be under oath and in the form required by the Commission. 42 U.S.C. 2000e-5(b). In keeping with the general purpose of the amendments to enhance the effectiveness of Title

VII enforcement, this change obviously was meant to relax, rather than add to, the pleading burden previously placed upon the Commission.

If, as respondent asserts, Congress intended amended Section 706(b) to impose heightened pleading requirements upon commissioners' charges, it would surely have said so—especially since in amending the section it was deleting language that had previously imposed higher standards on commissioners' than on lay charges. It is certainly not apparent how deletion of the requirements that a commissioner's charge be based upon "reasonable cause" and "set[] forth the facts upon which it [was] based" could increase rather than reduce any factual pleading burden (Pub. L. No. 88-352, 78 Stat. 259). It must be remembered, moreover, that a commissioner's charge merely commences an administrative investigation to determine whether there is reasonable cause to believe that the charge of discrimination is true. 42 U.S.C. 2000e-5(b). According to respondent, therefore, by deleting the "reasonable cause" requirement from Section 706(b), Congress actually imposed—without any discussion—a pleading requirement more stringent than reasonable cause, notwithstanding the fact that the purpose of the charge under Section 706(b) is merely to determine reasonable cause. The illogic of this contention is apparent. See *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1063 n.7 (rejecting conclusion of the court below that Section 706(b) imposes factual pleading requirements upon the Commission); *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 786 (same).

B. Although respondent eschews any intent to "impose 'technical pleading requirements'" upon the Commission or "unduly burden or impede" the Commission's processes (Resp. Br. 7), its hypertechnical construction of Section 706(b)'s oath and notice provisions (Resp. Br. 16-17)) belies that assertion.

1. The original Act provided that a charge by an aggrieved person must be "in writing under oath." Pub.

L. No. 88-352, 78 Stat. 259. Courts interpreting this requirement recognized that its purpose was "to protect employers from unfounded charges and harassment," but nevertheless uniformly held that " 'the provision is directory and technical rather than mandatory and substantive.' " *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969), quoting *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968). Accord, *Georgia Power Co.* v. *EEOC*, 412 F.2d 462, 466 (5th Cir. 1969); *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d at 357. None of these cases held that the oath requirement mandated factual specificity in the charge. See, *e.g.*, *Georgia Power Co.* v. *EEOC*, 412 F.2d at 466 ("it would be out of keeping with the Act to import common law pleading niceties" to charge).

The 1972 legislative history demonstrates that Congress intended to make no changes in the oath provision other than to apply it to commissioners' charges.[8] Accordingly, every court that has interpreted the oath provision of the amended statute has applied the same principles developed before 1972. See, *e.g.*, *Price* v. *Southwestern Bell Telephone Co.*, 687 F.2d 74, 77-78 & n.3 (5th Cir. 1982); *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 18 (2d Cir. 1981); *Russell* v. *American Tobacco Co.*, 528 F.2d 357,

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[8] The Senate bill as reported from committee did not contain an oath requirement. See S. Rep. 92-415, *supra*, at 55; 1972 Leg. Hist. 464. During the floor debates, an amendment inserting the oath requirement was proposed by Senator Allen, who stated that "all this amendment would do would be to go back to the present law and make no change in the requirement" (118 Cong. Rec. 4815 (1972); 1972 Leg. Hist. 1672). The Senate eventually adopted the present language found in Section 706(b) (118 Cong. Rec. 4815 (1972); 1972 Leg. Hist. 1673-1674) and the House agreed in conference to the Senate language. Nothing in this course of events suggests that Congress intended to intensify the oath requirement in 1972. Indeed, the section-by-section analysis of the Senate bill which became Section 706(b) merely states that "[t]he present requirement that charges must be in writing and under oath or affirmation has been retained." 118 Cong. Rec. 4941 (1972); 1972 Leg. Hist. 1770.

364 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *EEOC* v. *Sears, Roebuck & Co.*, 504 F. Supp. 241, 257 (N.D. Ill. 1980); *EEOC* v. *Sears, Roebuck & Co.*, 22 Fair Empl. Prac. Cas. 457 (N.D. Ga. 1980).[9] Indeed, one court, after exhaustive analysis of the legislative history, rejected "[a]ny notion" that the oath requirement was intended to introduce a new limitation on Commission action, commenting that "[i]f anything, the sponsors of the oath amendments, as revealed in their comments, believed that the pre-1972 language directed the filing of Commissioners' charges under oath." *EEOC* v. *Sears, Roebuck & Co.*, 504 F. Supp. at 257 n.28.

As respondent suggests, the purpose of the oath requirement is to protect employers from unfounded charges. The protection inherent in the oath requirement, however, lies in the fact that the charge must be memorialized in a solemnly sworn document. An oath is a "form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully." *Black's Law Dictionary* 696 (5th ed. 1979). Its purpose is to impress the oath taker with a feeling of obligation to speak the truth. McCormick, *Law of Evidence* 582 (1972). An oath is not, as respondent appar-

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[9] The cases cited by respondent (Resp. Br. 17-18) are not to the contrary. The quotation from *EEOC* v. *Appalachian Power Co.*, 13 Fair Empl. Prac. Cas. 1294, 1295 (W.D. Va. 1976), aff'd, 568 F.2d 354 (4th Cir. 1978), to the effect that the 1972 amendments created a "heightened responsibility" is taken out of context. In that case, the commissioner's charge was unsworn, and the court therefore merely held that, unlike the 1964 Act which imposed no oath requirement upon a commissioner's charge, the 1972 amendments imposed this "heightened responsibility." *Stewart* v. *Core Laboratories, Inc.*, 460 F. Supp. 931 (N.D. Tex. 1978), also involved an unsworn charge, and involved a private rather than a commissioner's charge. *New Orleans Public Service, Inc.* v. *Brown*, 369 F. Supp. 702 (E.D. La. 1974), involved a charge filed prior to the 1972 amendments and the Fifth Circuit resoundingly repudiated both the result and the rationale of the lower court's opinion (507 F.2d 160, 162-164 (1975)).

ently assumes (Resp. Br. 21), a statement of fact that, like an affidavit, can be tested for truth or falsity.[10] Therefore, the fact that commissioners' charges must be made under oath, in and of itself, satisfies the prophylactic purpose attached to the oath requirement by Congress.[11] See *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1064 ("The commissioner's good faith is presumed because of section 706(b)'s oath or affirmation requirement"); *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338 ("Employees have the assurance that any such estimates [of time periods] will be made in good faith because of § 706(b)'s requirement that charges be made under oath or affirma-

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[10] Respondent's argument that an oath must rest upon verifiable facts is premised solely on its equation of oaths with affidavits (Resp. Br. 21). The editors of *American Jurisprudence*, however, upon whom respondent primarily relies (Resp. Br. 21), specifically state that an oath "is distinguishable from an affidavit" (58 Am. Jur. 2d. *Oath and Affirmation* § 3 (1962)) because an oath "is a pledge" while an affidavit is a "statement of fact, which is sworn to as the truth" (*ibid.*). *Johnston Broadcasting Co.* v. *FCC*, 175 F.2d 351 (D.C. Cir. 1949), also cited by respondent in its attempt to impose a factual verification requirement upon an oath, is inapposite. That case involved construction of an affidavit requirement in connection with a license application. The court assumed that a valid affidavit must be made under oath. The court, however, did not assume that the converse was true; *i.e.*, that an oath must meet the requirements of an affidavit. 175 F.2d at 354.

[11] Respondent urges that a statement of the factual basis for a charge is necessary "to determine whether the oath was taken in good faith" (Resp. Br. 22). The same reasoning, however, would have mandated a factual statement under Title VII as originally enacted, when Commissioner's charges had to be based on "reasonable cause." The courts, however, repeatedly rejected the argument that factual pleading was required as an additional check on the good faith of high government officials. *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 242; *Bowaters Southern Paper Corp.* v. *EEOC*, 428 F.2d 799, 800 (6th Cir.), cert. denied, 400 U.S. 942 (1970).

tion"). Accord, *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787.[12]

2. Just as the oath requirement of Section 706(b) does not mandate that the Commission set forth the "factual basis" for a Title VII charge, the notice provisions of the statute similarly do not call for a prolix, detailed rendition of the "facts" underlying a discrimination charge. As explained in our opening brief (Pet. Br. 22-23), the "notice" provisions of Section 706(b) were drafted in 1972 to alter the Commission's then-prevailing practice of delaying the service of a charge upon a respondent until an EEOC officer was available to begin investigation into the charge. The notice provisions, therefore, were drafted "to accord respondents fair notice that charges are pending against them" (118 Cong. Rec. 4941 (1972)); they were not designed to impose onerous pleading burdens upon the Commission.[13]

III

A. Nor is there merit to respondent's claim that Commissioner Norton's charge does not provide "meaningful" notice of the "circumstances" of its alleged discriminatory

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[12] Unlike the above authority, none of the cases cited by respondent for the proposition that the Commission has "fil[ed] and pursu[ed] irresponsible charges" (Resp. Br. 22-23) involves a charge filed by a Commissioner of the EEOC. Respondent's implicit suggestion that EEOC commissioners are not to be trusted to exercise proper discretion in the performance of their duties is not a basis for thwarting enforcement of administrative subpoenas. See *NLRB* v. *Kingston Trap Rock Co.*, 222 F.2d 299, 302 (3d Cir. 1955) (court should not refuse to enforce an administrative subpoena simply "because of a self conjured groundless suspicion that there is 'danger' that a governmental employee will commit a wrongful act").

[13] Respondent's assertion (Resp. Br. 32) that there is a "critical link" between the oath requirement of Section 706(b) and its notice provisions is pure ipse dixit. Although a charge under Section 706(b) must be filed under oath, the content of the charge itself has expressly been left within the discretion of the Commission. 42 U.S.C. 2000e-5(b) (charges "shall contain such information and be in such form as the Commission requires").

activities (Resp. Br. 29).[14] The charge specifies that a Commissioner of the EEOC has reason to believe that the company has excluded blacks from "managerial, professional, technical, office/clerical, craft, and service workers positions," and has confined women to office and clerical positions (Pet. App. 44a). The charge clearly notifies respondent of the substance of the allegations against it, and this recitation of the "circumstances" of respondent's conduct satisfies the requirements of Title VII as well as the dictionary. See *Webster's Third New International Dictionary*, 410 (unabridged 1976) (defining "circumstance" as "a specific part, phase, or attribute of the surroundings or background of an event, fact, or thing or of the prevailing conditions in which it exists or takes place"); *Black's Law Dictionary*, *supra*, at 220 (defining circumstances as the "[a]ttendant or accompanying facts, events or conditions").

What respondent actually seeks is not "notice" but the opportunity to "verif[y]" whether the Commission indeed has "authority to investigate" a particular claim (Resp. Br. 30). That is, respondent desires the opportunity to litigate whether the Commission has "facts" to support the allegations of its charge at the very outset of the administrative proceeding that is itself designed to determine whether or not there is reasonable cause to believe that those allegations are true. In short, respondent seeks to turn the Title VII enforcement scheme on its head by requiring evidence of reasonable cause in order to commence an investigation into whether such cause exists. Indeed, the two courts of appeals that have

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[14] Respondent concedes that it has received adequate notice of the "place" of the alleged discrimination, because the commissioner's charge in this case stated that the alleged violations occurred at the Wood River Refinery (Resp. Br. 9 n.9). In light of respondent's construction of the "date" and "circumstances" requirements of Section 706(b), however, we note that the charge did not specify in which offices, corridors, lunchrooms, lavatories and parking lots the alleged discriminatory acts took place.

considered the question since the decision below was rendered have strongly criticized and rejected any "factual basis" requirement for Title VII charges for precisely this reason. *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787; *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1063 n.7.

B. Respondent recognizes that, "because of its inherent nature" (Resp. Br. 25), a pattern or practice charge is "not susceptible of * * * precision with respect to dates" (*ibid.*). Therefore, a "good faith estimate" of the probable dates of the alleged violations is "the only practical way of meeting the date requirement." *Ibid.*, citing *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1064; *EEOC* v. *Dean Witter Co.*, 643 F.2d at 1338. As explained in our opening brief (Pet. Br. 27-29), July 2, 1965—the date utilized by Commissioner Norton in her amended charge—is a good faith estimate of the probable time period of respondent's allegedly discriminatory activities. See *EEOC* v. *A.E. Staley Manufacturing Co.*, 711 F.2d at 787.[15]

Respondent, however, argues that July 2, 1965, cannot be a "good faith estimate" of the probable time period of

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[15] In *A.E. Staley*, the Seventh Circuit held that July 2, 1965, was a "good faith estimate" of the time periods involved in a commissioner's charge. 711 F.2d at 786. In making that determination, the court relied, in part, on the district court's conclusion that the Commission did not have a policy of inserting the effective date of Title VII pro forma into all commissioners' charges. *Ibid.* As we noted in our opening brief (Pet. Br. 28-29), the Sixth Circuit's suggestion in *EEOC* v. *K-Mart Corp.*, *supra*, that the use of July 2, 1965, does not satisfy the date requirement of Section 706(b) was based upon a lower court finding that the Commission indeed "had a policy of inserting pro-forma the effective date of Title VII" into commissioners' charges (694 F.2d at 1063). Therefore, the only authority for the position that July 2, 1965, does not represent a "good faith estimate" of the probable time periods involved in a pattern or practice charge rests upon an erroneous finding regarding Commission practice. See Pet. Br. 28-29 (detailing Commission policy regarding use of the effective date of Title VII in commissioners' charges).

its misconduct because an audit conducted from 1973 to 1975 by the Department of the Interior Office of Equal Opportunity (the predecessor to the Office of Federal Contract Compliance Programs) found its Wood River Facility to be in compliance with Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14308 (1967), and Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969). Apart from the fact that respondent's "compliance" from 1973 to 1975 is subject to dispute,[16] this contention underscores once again that respondent's primary goal in this litigation is not to obtain "notice" of its alleged wrongdoing. Rather, respondent desires to litigate the merits of the averments in Commissioner Norton's charge. Respondent has been charged with discriminating against blacks and women

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[16] Records in the Commission's files indicate that the audit relied upon by respondents found numerous deficiencies, including underutilization of women and minorities, use of an improper labor area, and deficient equal employment opportunity policies. Pre-Review Analysis, Shell Oil Company, Wood River Refinery, January 22-26, 1973; Desk Audit Section, Follow-up Review of AAP at 2, 3, 7, 10 (received June 9, 1975); On-site Review, June 16-19, 1975, at 1, 9; Coding Sheet-Order 14, Shell Oil Company, Wood River Refinery, July 3, 1975. A conciliation agreement signed by Shell on June 19, 1975, noted "deficiencies" in respondent's employment practices, and stated that respondent would not be "in compliance" until they were corrected. Conciliation Agreement between Office for Equal Opportunity, U.S. Department of the Interior, and Shell Oil Company, Wood River, Illinois, dated June 19, 1975. Thus, far from contradicting the Commission's charge, the audit cited by respondent buttresses the case for investigating respondent's employment practices. (Copies of the 1973-1975 audit documents have been lodged with the Clerk of this Court.)

In any event, even if the audit had found no deficiencies, that fact alone would not suggest that Commission inquiry would be inappropriate. The standards of Exec. Order No. 11,246, under which the 1973-1975 audit was conducted, differ from those of Title VII and therefore do not control the question of compliance with Title VII. See *Swint* v. *Pullman Standard*, 539 F.2d 77, 95 n.44 (5th Cir. 1976); *Stevenson* v. *International Paper Co.*, 516 F.2d 103, 106 (5th Cir. 1975).

since at least 1965, but, rather than submit to an administrative investigation to determine whether there is any basis for that charge, respondent challenges the Commission to overcome respondent's "proof" (in the form of the 1973 audit) that it could not be guilty of the alleged discrimination. The Commission has made an allegation, the respondent has countered with a contrary allegation, and it now argues that the Commission may not proceed without first bringing forth evidence to support the original allegation. Although as set forth in note 16, *supra*, the government does have grounds upon which to rebut respondent's asserted "compliance" with federal equal employment opportunity law during the period 1973-1975, the Commission should not be forced to present such proof in order to have its investigatory subpoena enforced. A subpoena enforcement proceeding should not become—as this one undoubtedly has—a mini-trial on the merits of an administrative charge. See, *e.g.*, *Graniteville Co. (Sibley Division)* v. *EEOC*, 438 F.2d at 36.[17]

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[17] Contrary to respondent's further contentions (Resp. Br. 25), the date July 2, 1965, certainly informs an employer what records might be relevant during the administrative investigation. See 29 C.F.R. 1602.14 (requiring employer to maintain any existing employment records relevant to a charge; prior to issuance of a charge employer need only maintain records for six months). A more "specific" date, moreover, would not greatly aid a district court in determining "relevancy" during a subpoena enforcement action. As we have previously detailed (Pet. Br. 30-31), the date alleged in a charge does not restrict the temporal scope of a Commission investigation. See *Local 104, Sheet Metal Workers*, 439 F.2d at 243 (information regarding pre-Act practices is relevant to Commission inquiry). Therefore, even if the court were given a more "precise" date than July 2, 1965, information prior to that date could still be relevant to a Commission investigation and therefore properly be subject to an administrative subpoena. See *EEOC* v. *University of New Mexico*, 504 F.2d 1296, 1304 (10th Cir. 1974); *Georgia Power Co.* v. *EEOC*, 412 F.2d at 468. See also *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 309 n.15 (1977).

The Equal Employment Advisory Council's ("EEAC") argument, raised here for the first time, that the charge is deficient because

IV

In the final analysis, the record in this case is the strongest argument against the interpretation of Section 706(b) espoused by respondent. The Commission's investigation of respondent's employment practices has been stalled for more than three years[18] because of respondent's objections to the sufficiency of Commissioner Norton's charge. Moreover, the record—and respondent's brief—leave little doubt that "notice" is hardly respondent's primary concern.[19] Rather, respondent seeks "objective, verifiable information" showing the "source of [the Commission's] belief" that discrimination occurred so that a federal court can determine whether "the belief is well-founded" (Resp. Br. 22, 27, 30). Respondent, in sum, seeks to transform Commission subpoena enforcement cases into contests on the merits of the underlying charges of discrimination.

Respondent's construction of Section 706(b) thus is contrary to well-established principles governing the conduct of subpoena enforcement actions (see Pet. Br. 32-

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it does not "demonstrate" that the violation continued to within 180 days of the date of filing (EEAC Br. 16) is nothing more than a claim that the EEOC must prove its case before it investigates its charge. One of the purposes of the Commission's investigation is to determine whether the charge is timely; the Commission need not prove timeliness as a pre-condition to its investigation. *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir. 1977); *Pacific Maritime Association* v. *Quinn*, 491 F.2d 1294, 1296 (9th Cir. 1974). After reviewing all relevant evidence, the Commission may determine that the discrimination did not continue to within 180 days of the filing date and dismiss the charge as untimely. See § 706(e), 42 U.S.C. 2000e-5(e); 29 C.F.R. 1601.19(a).

[18] Respondent's action to quash the Commission's investigatory subpoena was filed on September 18, 1980 (J.A. 6).

[19] The record demonstrates that respondent was well aware that the charge was based on a statistical profile, and that its own EEO-1 reports supplied the raw data for that profile. See J.A. 92, 157.

35).[20] The general rule that administrative subpoenas should be enforced by the federal courts "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant" applies with full force to the Title VII administrative scheme. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). See also *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943).[21] Here, as in other administrative investigations, "[j]udicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes." *FTC* v. *Standard Oil Co.*,

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[20] As we have noted, the Commission's investigatory authority was modeled on the National Labor Relations Act which, like Title VII, requires the filing of a charge prior to administrative inquiry. Under that Act, the courts have uniformly rejected arguments that courts must consider the merits or the factual basis for an administrative charge prior to enforcing an administrative investigatory subpoena. See, *e.g.*, *NLRB* v. *Dutch Boy, Inc., Glow Lite Division*, 606 F.2d 929, 933 (10th Cir. 1979); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 111-112 (3d Cir. 1979); *NLRB* v. *Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir 1975); *NLRB* v. *Northern Trust Co.*, 148 F.2d 24, 26 (7th Cir.), cert. denied, 326 U.S. 731 (1945); *Cudahy Packing Co.* v. *NLRB*, 117 F.2d 692, 694 (10th Cir. 1941).

[21] And see, *e.g.*, *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1065-1066; *EEOC* v. *Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981); *NLRB* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 (9th Cir. 1981); *NLRB* v. *Dutch Boy, Inc., Glow Lite Division*, 606 F.2d 929, 933 (10th Cir. 1979); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 111 (3d Cir. 1979); *NLRB* v. *Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975); *New Orleans Public Service, Inc.* v. *Brown*, 507 F.2d 160, 165 (5th Cir. 1975); *Local 104, Sheet Metal Workers* v. *EEOC*, 439 F.2d at 242; *Link* v. *NLRB*, 330 F.2d 437, 440 (4th Cir. 1964); *NLRB* v. *Kingston Trap Rock Co.*, 222 F.2d 299, 301 (3d Cir. 1955).

449 U.S. 232, 243 (1980) ("Socal").[22] If respondent's contentions were accepted by this Court, Commission investigations would inevitably degenerate into protracted district court litigation focusing upon whether the Commission has shown, at the very outset of its investigation, that particular respondents have indeed violated Title VII. See, *e.g.*, Resp. Br. 40 n.37; National Association of Manufacturer's Br. 5; Chamber of Commerce Br. 14.[23]

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[22] Respondent's argument (Resp. Br. 8, 38) that the general principles enunciated by this Court in *FTC* v. *Standard Oil Co.*, *supra*, do not apply to this case does not withstand scrutiny. Contrary to respondent's implication, the government did not cite *Socal* for the proposition that the Commission could investigate without first issuing an administrative charge (see Resp. Br. 36-37). Nor did *Socal* involve the scope of the FTC's investigatory powers (*ibid.*). Rather, in *Socal* the issue was whether a court could scrutinize the factual basis for an administrative complaint which, according to the respondent, had been improperly issued. The Court concluded that the issuance of an administrative complaint is not subject to judicial review because it is merely a threshold determination and review at that early stage would interfere with "the proper functioning of the agency" and result in inefficient and perhaps unnecessary piecemeal review. 449 U.S. at 241-242. As in *Socal*, the Commissioner's charge in this case merely triggers an investigation that has no determinate consequences for respondent (see Pet. Br. 43). Therefore, the holding in *Socal* that judicial review of preliminary administrative determinations "should not be a means of turning prosecutor into defendant" (449 U.S. at 243) applies with equal force to judicial enforcement of the EEOC's investigatory subpoenas.

[23] The argument of amicus Chamber of Commerce, based on *Marshall* v. *Barlows, Inc.*, 436 U.S. 307 (1978), that the Commission's investigatory subpoena violates the Fourth Amendment (Chamber of Commerce Br. 11-15) is not before this Court. Shell unsuccessfully raised the constitutional argument below (Pet. App. 13a), did not file a petition for a writ of certiorari on the issue, and has not urged this ground as an alternative basis for affirmance.

In any event, the Chamber's argument is without merit. In the context of administrative subpoenas of corporate records, the Fourth Amendment requires only that the demand be for a purpose

Such a result should not be countenanced. As the Fourth Circuit recognized long ago, "judicial hearings into the merits of the charging party's allegations * * * frustrate congressional intent by entailing extensive delay in the disposition of Title VII cases." *Graniteville Co. (Sibley Division)* v *EEOC*, 438 F.2d at 36. Such delay is especially unwarranted in the context of Title VII because "[i]n an EEOC case, time is not just money. It is the welfare of those very citizens whom Congress directed the Commission to protect." *In re EEOC*, 709 F.2d at 398.[24]

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lawfully authorized by Congress and that the documents sought be relevant to the inquiry and not unduly burdensome to produce. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 209. Accord, *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967); *United States* v. *Morton Salt Co.*, 338 U.S. at 652. The district court here determined that the subpoena sought relevant information and that compliance would not be unduly burdensome (Pet. App. 29a-30a). The court of appeals affirmed (Pet. App. 13a).

[24] Respondent submits that the Court should at least require the Commission to identify the relevant labor market and job categories used for statistical comparison in all future commissioners' charges (Resp. Br. 41 n.38). But, any such requirement would inevitably cause employers to attempt to rebut the Commission's comparative data, as respondent has attempted to do in this case. Prior to administrative investigation of the charge, moreover, the Commission is in no position to litigate such issues as "relevant" labor markets and "appropriate" job categories. Nor would requiring specification of the factual basis of a charge facilitate early settlement, as respondent suggests (Resp. Br. 42); the Commission can hardly be expected to settle a systemic charge prior to obtaining information regarding the allegations of that charge.

For the reasons set forth above and in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

DAVID L. SLATE
General Counsel

PHILIP B. SKLOVER
Associate General Counsel

VELLA M. FINK
Assistant General Counsel

DIANNA B. JOHNSTON
Attorney

Equal Employment Opportunity Commission

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